SBM STATE BAR OF MICHIGAN

p (517) 346-6300 306 Townsend Street www.michbar.org
p (800) 968-1442 Michael Franck Building
f (517) 482-6248 Lansing, MI 48933-2012

APPELLATE PRACTICE SECTION

October 31, 2011

Corbin R. Davis
Clerk of the Court
Michigan Supreme Court
Michigan Hall of Justice
925 W. Ottawa, P.O. Box 30052
Lansing, MI 48909

RE: ADM File No. 2010-19 - Proposed Amendment of Subchapter 7.100 of the Michigan Court Rules

Dear Clerk Davis:

At its October 21, 2011 council meeting, the State Bar of Michigan's Appellate Practice Section considered the above rule amendment published for comment. The Section voted unanimously to support the amendment, and recommended certain revisions to the proposed rules. With one exception, the Section voted unanimously to support the enclosed recommendations for revisions to ADM 2010-19. The one exception pertains to the Section's recommended revision of MCR 7.122(B), contained below in APS Comment 13. As for that recommended revision, the Section voted 15 in favor, 1 opposed, and 2 abstained.

ADM 2010-19 offers a wholesale revision of the circuit court rules appeals rules. The Section wholeheartedly supports this Court's promulgation of the majority of the circuit court rules contained in ADM 2010-19. This package represents a significant improvement over the current circuit rules. To the extent that any major overhaul can be improved, the Appellate Practice Section provides its recommendations to further improve the circuit court appeal rules. The Section applauds the efforts that have gone into this package over the past 10 years, which has included much hard work from our fellow council members, Don Fulkerson and Anica Letica.

ADM 2010-19 mistakenly identifies that the proposal was

submitted to this Court by the Appellate Practice Section. In actuality, the group who worked for so many years on this package was the Circuit Court Appellate Rules Revision Committee, which represented a collaboration of appellate attorneys, trial court judges, and appellate judges. Indeed, the Section has been providing feedback to the working group on this proposal over the years, but we cannot take credit for its labors.

APS Comment 1 – MCR 7.102 Definitions.

The Appellate Practice Section recommends that the Court strike the definition of probate registered contained in MCR 7.102(9). The proposed rule states that the probate register is the same as the clerk of the probate court. This is technically incorrect. The probate register is a different office from the clerk of the probate court. Moreover, the term "probate register" is not used anywhere else in the proposed amendments. As such, the Appellate Practice Section believes that including the definition creates the potential for confusion because it is both unnecessary and incorrect.

~~(9) "probate register" means clerk of the probate court.~~

APS Comment 2 – MCR 7.104 Appeal by right.

MCR 7.104(D) provides a list of items that must accompany an appeal by right to the circuit court. The language in MCR 7.104 referencing an appeal bond is largely based on MCR 7.204(E), which does not require a bond. MCR 7.204(E) contrasts with the current version of MCR 7.101 which requires a "bond" for "costs." The comments to the proposed rule indicate that the appeal bond requirement has been eliminated. Therefore, to avoid confusion, MCR 7.104(D) should be modified so that the bond is filed when the appeal by right is filed in circuit court only *if* a bond is filed (i.e. to obtain a stay or if a bond is otherwise required by law). The Section recommends the following modification to the rule:

(4) <u>if the appellant has filed a bond,</u> a <u>true</u> copy of ~~any~~ <u>the</u> ~~appeal~~ bond.

APS Comments 3-6 – MCR 7.105 Application for leave to appeal.

The proposed rules modify a circuit court appeal at the application stage. MCR 7.105(C) requires an answer to an application be filed within 14 days of the application. The Appellate Practice Section is concerned that, by the time appellate counsel (or even trial counsel) receives a copy of the application, that less than 14 days will be available to prepare answer. Depending on where the appellant is located, it often will take several days for a document to arrive in the mail, shaving off critical days from the answer period. Therefore, the Section believes that 14 days is an inadequate amount of time to file an answer to the application. Accordingly, the Section

recommends that the 14-day answer period be modified to 21 days. This recommendation also mirrors the corollary rule in the Court of Appeals, MCR 7.205(C).

> (C) Answer. Any other party in the case may file, within ~~14~~ 21 days of service of the application:

The Section also recommends allowing a short reply brief. This rule change would model the Section's proposed change to MCR 7.205, which is being submitted together with the Section's comments on ADM 2010-19. The Section's proposed rule change would add MCR 7.205(D) and would allow the appellant to file a reply within 21 days of service of the appellee's answer to the application. Likewise, the Section recommends adding a provision permitting reply briefs at the application stage in circuit court appeals. To conform with the Section's other recommendations concerning timing, the Section recommends that the reply be filed within 14 days of service of the appellee's answer, and that the reply conform with MCR 7.212(G).

> (D) Reply. Within 7 days of service of the answer, the appellant may file a reply that conforms to MCR 7.212(G).

Because the Section recommends extending the answer time by one week and adding an opportunity for a reply, the Section recommends changing MCR 7.205(D) to extend the time for the circuit court's decision.

> ~~(D)~~ (E) Decision.
>
> (1). [no change.]
>
> (2) Absent good cause, the court shall decide the application within ~~28~~ 56 days of the filing date.

The above-noted rule change would also impact 7.105(E), which currently provides that if a party needs a decision in less than 28 days it should file a motion for immediate consideration. Subsection (E) should be revised to reflect the 56-day period. Accordingly, the Section recommends the following change to MCR 7.105(E):

> ~~(E)~~ (F) Immediate Consideration. When an appellant requires a decision on an application in few than ~~28~~ 56 days, the appellant must file a motion for immediate consideration concisely stating why an immediate decision is required.

To the extent this Court has concerns that the Section's proposed timing modifications of MCR 7.105 will delay the circuit court's decision on the application, the Section believes that those concerns are outweighed by the benefits achieved by extending the timing periods contained in MCR

7.105. First, practitioners need sufficient time to prepare an articulate and researched response to the application. Second, the circuit court on appeal needs sufficient time to weigh the merits of each party's arguments. Third, the delay accompanied by the Section's recommended revisions is alleviated by MCR 7.105(D)(1), which provides that there is no oral argument on the application unless ordered by the Court. In current circuit court appeal practice, it is typical for the circuit court to require oral argument on the application in order to decide whether to grant or deny the application. Scheduling that hearing can often delay the case by one or more months. In addition, in current circuit court appeal practice, many courts decide the case on the merits at the application stage. That a circuit court would decide the application without full briefing and oral argument elevates the need for the parties to have adequate time to prepare the answer and reply.

APS Comment 7 – MCR 7.109 Record on Appeal.

The Section recommends modification of MCR 7.109(G)(3), which requires the trial court to notify the parties when the record has been sent to circuit court. This rule is important because the notification that the record has been sent to the circuit court triggers the timing for the appellant's brief in MCR 7.111(A)(1). In current practice, the trial courts are inconsistent about if or how they inform counsel that the record has been sent. The Section recommends modifications to MCR 7.109 to remove traps from the current practice, which traps have carried over the to proposed rules. The Section believes that the circuit court is in the best position to know when the record is filed, and has more procedures in place to ensure that counsel is notified that the record has been filed. This proposed rule gives more control to the circuit court, who is interested in the appeal process. It also removes the concern of appellate practitioners that, under the current rule, an appellate practitioner's briefing deadline is tied into an event (the trial court notifying the party that the record has been sent) when the rule does not require written notice. In the experience of practitioners, some trial courts simply telephone appellate counsel to provide notice, which appears to be permissible under the current version of the rule. Under the current procedure, there is an inherent risk that a telephone message could be left with someone other than the attorney and the attorney would not learn that the filing of the record had occurred until after the time had passed to file the appellant's brief.

> (3) The ~~trial court or agency~~ circuit court must immediately ~~notify~~ send written notice to the parties when the record is ~~transmitted to~~ filed in the circuit court.

APS Comments 8-10 – MCR 7.111(A)(1) Appellant's Brief.

The Section recommends several revisions to MCR 7.111(A) regarding the timing and service of appellant's brief. First, to comport with the Sections recommendations above regarding the notice provided to the parties that the record has been filed, the Section recommends modifying MCR 7.111(A)(1)(a) such that it reflects that the circuit court provides written notice to the parties.

Second, the Section recommends extending the time for filing the appellant's brief from 21

days to 28 days to provide appellate counsel adequate time to prepare the brief. This is still half the time allotted in the Court of Appeals. Moreover, appellate rules typically provide the appellant some longer period of time to file the appellant's brief than the time provided to file the appellee's brief. As currently proposed, the appellee's brief is due within the same number of days (21) as the appellant's brief.

Third, the Section recommends modifying the provision regarding extensions of the briefing deadline. As the proposed rule currently reads, it is unclear whether the circuit court has authority to allow an extension for more than 14 days. The Section proposes altering that language to mirror the Court of Appeals rules regarding extensions of time in MCR 7.212(A)(1)(a)(iii). This proposed modification would also give the circuit court more flexibility to manage its own docket.

As recommended by the Section, the revised version of MCR 7.111(A)(1)(a) would read:

(a) Within ~~21~~ 28 days after the circuit court provides written notice under MCR 7.109(G)(3) that the record on appeal is filed with the ~~trial court or agency notifies the parties that the record on appeal has been sent to the~~ circuit court, the appellant must file a brief conforming to MCR 7.212(C) and serve it on all other parties to the appeal. The time may be extended for 14 days by stipulation and order. ~~or by an order granting a motion for extension.~~ The circuit court may extend the time on motion. The filing of a motion does not stay the time for filing a brief.

APS Comment 11 -- MCR 7.111(A)(2) Appellee's Brief.

To be consistent with the Section's recommendations above regarding extensions of time for the filing of an appellant's brief, the Section recommends modifying MCR 7.111(A)(2) to mirror the previous section.

(2) *Appellee's Brief.* Within 21 days after the appellant's brief is served on the appellee, the appellee may file a brief. The brief must conform to MCR 7.212(D) and must be served on all other parties to the appeal. The time may be extended for 14 days by stipulation and order. ~~or by an order granting a motion for extension.~~ The circuit court may extend the time on motion. The filing of the motion does not stay the time for filing a brief.

APS Comment 12 -- MCR 7.111(A)(3) Reply brief.

To be consistent with the Section's recommendations above in MCR 7.105(D), and with the Section's separate proposal to the Supreme Court regarding MCR 7.205, the Section recommends adding a new subrule MCR 7.111(A)(3) to allow the appellant to file a reply brief.

(3) Within 14 days after the appellee's brief is served on appellant, the appellant may file a

reply brief. The brief must conform to MCR 7.212(G) and must be served on all other parties to the appeal.

APS Comment 13 – MCR 7.122 Appeals from Zoning Ordinance Determinations.

It appears that the proposed version of MCR 7.122 changes the law as to what triggers the running of the time for taking an appeal in a zoning case. Presently, the local government's decision is entered when it is reduced to writing, either by approval or certification of the minutes or by issuing a written permit or other written decision. The proposed rule, however, assumes that the decision will be embodied in formal minutes, which is not always the case. Moreover, the issuing of a written permit or other written decision allows the agency to make its decision immediately effective. The Section therefore recommends that the issuing of a written decision should be one of the triggers for the 30-day time limit for an appeal and would add the following language to MCR 7.122(B):

> (B) Time requirements. An appeal under this rule must be filed within the time prescribed by the statute applicable to the appeal. If not time is specified in the applicable statute, the appeal must be filed within 30 days after the certification of the minutes of the board or commission from which the appeal is taken, or within 30 days after the board or commission issues its decision in writing, whichever deadline comes first.

This proposed change is consistent with § 606(3) of the Michigan Zoning Enabling Act, MCL 125.3606(3).

The Section also recommends correcting the typographical error in MCR 7.122(F), which references MCR 7.211 rather than MCR 7.111.

> (F) Briefs. Unless otherwise ordered, the parties must file briefs complying with MCR ~~7.211~~ 7.111.

The Section thanks this Court's consideration of the Appellate Practice Section's recommended revisions to ADM 2010-19.

Sincerely,

Liisa R. Speaker
Chair, Appellate Practice Section